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No. 93-284

U.S. DISTRICT COURT  
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**In the Supreme Court of the United States**

OCTOBER TERM, 1993

SECURITY SERVICES, INC., PETITIONER

v.

K MART CORPORATION

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AND THE  
INTERSTATE COMMERCE COMMISSION  
AS AMICI CURIAE  
SUPPORTING RESPONDENT

DREW S. DAYS, III  
*Solicitor General*

LAWRENCE G. WALLACE  
*Deputy Solicitor General*

MICHAEL R. DREEBEN  
*Assistant to the Solicitor  
General*

*Department of Justice  
Washington, D.C. 20530  
(202) 514-2217*

HENRI F. RUSH  
*Acting General Counsel*

ELLEN D. HANSON  
*Senior Associate  
General Counsel*

JUDITH A. ALBERT  
THEODORE K. KALICK  
*Attorneys  
Interstate Commerce  
Commission  
Washington, D.C. 20423*

**BEST AVAILABLE COPY**

### QUESTION PRESENTED

Whether, under the filed rate doctrine, a motor carrier may collect a tariff rate that contains only one of two components necessary to establish a mileage-based rate, notwithstanding the Interstate Commerce Commission's longstanding interpretation of its rules governing tariff filing that such a tariff is void as a matter of law.

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INTEREST OF THE UNITED STATES AND THE  
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The Interstate Commerce Commission (ICC or Commission) administers the Interstate Commerce Act (Act), 49 U.S.C. 10101, *et seq.* The United States is frequently a party to actions involving the application of the Act, 28 U.S.C. 2322, 2323, and has been a party to proceedings involving the issue in this case. Because this case involves the application of the filed rate doctrine and the validity of a Commission regulation governing tariff filings, the United States and the Commission have a significant interest in its resolution.

(1)

## STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Act, 49 U.S.C. 10761, 49 U.S.C. 10762(a), and 49 U.S.C. 10762(b)(1), and the relevant ICC regulations, 49 C.F.R. 1312.4(d), 1312.10(a) and (b), 1312.13(c)(1), 1312.17(b), 1312.25(a)-(e), 1312.27(e), and 1312.30, are set forth in the appendix to this brief. App., *infra*, 1a-11a.

## STATEMENT

The Commission has a longstanding rule that, when a motor carrier's tariff purports to establish a rate by cross-referencing another tariff, the carrier must participate in that tariff. When the carrier fails to participate in that other tariff, the ICC's rule specifies that the carrier's tariff is void as a matter of law. 49 C.F.R. 1312.4(d). In this case, the court of appeals concluded that a carrier whose tariff is void under that rule may not rely on the tariff as a basis for collecting undercharges from a shipper.

### A. The Statutory and Regulatory Framework

1. Since 1935, the Commission has regulated interstate transportation by motor carriers. Motor Carrier Act of 1935, ch. 498, 49 Stat. 543. A motor common carrier providing transportation subject to regulation under the Act must publish its rates in tariffs filed with the ICC. 49 U.S.C. 10761(a), 10762(a)(1). The carrier "may not charge or receive a different compensation for that transportation \* \* \* than the rate specified in the tariff." 49 U.S.C. 10761(a). The Court has interpreted these provisions "to create strict filed rate requirements and to forbid equitable defenses to the collection of the filed tariff." *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 127 (1990); *Reiter v. Cooper*, 113 S. Ct. 1213, 1219 (1993).

The Act authorizes the ICC to administer and enforce those statutory requirements, 49 U.S.C. 10321(a), 11701,

11702, and, in particular, to "prescribe the form and manner" of tariff filing, 49 U.S.C. 10762(b)(1), and the contents of filed tariffs, 49 U.S.C. 10762(a)(1). Although each carrier is responsible for establishing its own rates, see 49 U.S.C. 10702, 10762, the Commission permits a carrier's tariff to incorporate by reference rate components contained in tariffs filed by other carriers or agents. That method of setting forth a rate, however, is permitted only if the carrier formally participates in the other tariffs. 49 C.F.R. 1312.27(e). The Commission's regulations further provide that

a carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed. *Absent effective concurrences or powers of attorney, tariffs are void as a matter of law.*

49 C.F.R. 1312.4(d) (emphasis added). That rule is known as the "void-for-nonparticipation" rule.

The ICC first articulated its requirements for participating in another carrier's tariff and its rule that a carrier's tariff is void if the carrier allows its participation in a referenced tariff to lapse in *Cancellation of Participation in Agency Tariffs*, 4 Fed. Reg. 4,440 (1939). See also *New England Motor Carrier Rates*, 8 M.C.C. 287, 304 (1938) (prohibiting use of tariff without participation). In the ensuing four decades, when changes in rates were relatively infrequent, carriers were generally diligent in complying with the participation requirement. On the few occasions when the Commission became aware that a carrier had failed to comply with the participation requirement, the ICC enforced it. *Halliburton Co. v. Consolidated Copperstate Lines*, 335 I.C.C. 201, 207 (1969) (lack of participation in the tariff operated to defeat an undercharge claim).

2. In the Motor Carrier Act of 1980 (MCA), Pub. L. No. 96-296, 94 Stat. 793, Congress substantially revised the transportation policy of the United States to en-

courage a more competitive environment in the motor carrier industry. Among other things, the MCA significantly relaxed restrictions on entry into the motor carrier industry. 49 U.S.C. 10922. In response to those developments, the Commission took steps to simplify and clarify its tariff filing rules. See 48 Fed. Reg. 31,265 (1983).

In revising its rules, the Commission recognized that the participation requirement continued to serve important objectives. Accordingly, while modifying many requirements, the ICC retained its longstanding void-for-nonparticipation policy. See *Revision of Tariff Regulations, All Carriers*, 1 I.C.C.2d 404, 434 (1984). As the Commission explained in *Wonderoast, Inc.—Transp. Systems International, Inc.*, 8 I.C.C.2d 272, 277-278 (1992), applied in *Lovett v. Wonderoast*, 145 B.R. 40 (Bankr. D. Minn. 1992), the rule ensures that a carrier is not bound by the rate actions of another (including revisions to the referenced tariff) unless the carrier has clearly authorized the other person to act on its behalf through a continuing agency relationship. The participation rule thus promotes the statutory requirement that individual motor "carriers are responsible ultimately for filing their own rates." 8 I.C.C.2d at 278.

3. This case concerns operation of the Commission's void-for-nonparticipation rule with respect to mileage rate tariffs. A mileage rate consists of two indispensable components: the rate per mile and the distances between shipping points. Those two components are multiplied together to obtain the proper charge for a shipment. 49 C.F.R. 1312.30; Pet. App. 7b. The carrier can modify a rate by changing either the rate per mile or the distance component of its mileage rate. Thus, both components must be present for a tariff to contain a "rate" that satisfies the carrier's obligation to file its rates with the Commission under 49 U.S.C. 10762(a)(1).

Carriers may establish the distance portion of their mileage rates in three ways: (1) listing the distances be-

tween all relevant locations in their tariff; (2) attaching a map to the tariff; or (3) referring to a separately filed distance guide tariff. 49 C.F.R. 1312.30(c)(1). If the carrier uses the third method, the choice of a distance guide affects the ultimate charge for a shipment, because mileage figures vary depending upon the guide used, and vary even from one edition to the next of the same guide. Because a distance guide is itself a tariff, when a carrier refers to a distance guide to establish its mileage rates, it must do so through formal participation. 49 C.F.R. 1312.27(e).

#### B. The Commission's Decision in *Jasper Wyman*

In 1991, the Commission was asked to review the application of the void-for-nonparticipation rule in the context of mileage rate tariffs. During the 1980s, Overland Express, Inc. (Overland), a motor carrier, had filed tariffs with the Commission that established the mileage component of its rates by referring to the Household Goods Carriers' Bureau (HGCB) Mileage Guide Tariff 100 for distances. In 1970 Overland had submitted a power of attorney to HGCB, but in 1982 Overland ceased to pay the fee required to participate in the HGCB Mileage Guide. At that point, Overland's participation in that guide lapsed and HGCB, by a tariff filing effective May 22, 1983, removed Overland from the list of carriers that participated in its Mileage Guide Tariff.

After Overland's bankruptcy, its trustee sought to collect undercharges from shippers based on the difference between the rates Overland had actually billed the shippers and the rates purportedly reflected in Overland's tariffs. Numerous shippers who were sued by the trustee petitioned the ICC for a declaratory order that Overland could not establish undercharge claims based on tariffs that incorporate distances from the HGCB Mileage Guide. They argued that, because Overland had failed to participate in that tariff as required by ICC regulations, its

mileage tariffs were void as a matter of law. The ICC opened a docket to consider that issue and, in view of its industry-wide importance, requested comments from the public. *Jasper Wyman & Sons, et al.—Petition for a Declaratory Order—Certain Rates and Practices of Overland Express, Inc.*, 8 I.C.C.2d 246 (1993), petition for review granted, *Overland Express, Inc. v. ICC*, 996 F.2d 356 (D.C. Cir. 1993), petition for cert. pending *sub nom. ICC v. Overland Express, Inc.*, No. 93-883 (filed Dec. 3, 1993).

After thorough consideration, the Commission determined that when a tariff refers to a distance guide to establish rates and the carrier has not participated in that guide, its tariff is "void as a matter of law" by virtue of 49 C.F.R. 1312.4(d) and cannot support a claim to collect undercharges. *Jasper Wyman*, 8 I.C.C.2d at 247-248, 263. The Commission explained that because the carrier in that case had failed to pay the participation fee to the distance guide's publisher and the publisher had cancelled the carrier's participation in that tariff by a public filing, the carrier's "mileage rate tariff ha[s] no method to compute mileage," is "incomplete," and "cannot lawfully support the freight charges sought to be assessed." *Id.* at 247-248. The Commission noted that carriers and the public have "constructive notice" of the cancellation of participation in a distance guide, *id.* at 254, and that, once the cancellation is published, the carrier's tariffs "cease[] to satisfy the fundamental purpose of tariffs; to disclose the freight charges due to the carrier." *Id.* at 258.

### C. Judicial Review of *Jasper Wyman*

1. *The present case.* In 1984, Riss Internal Corporation, a now-defunct motor carrier, filed a mileage rate tariff with the Commission that contained a per-mile rate and that referred to the HGCB Mileage Guide 100 tariff for distances. Riss, however, failed to pay the required participation fee to HGCB. Accordingly, by a tariff filing

effective February 19, 1985, HGCB filed a supplement to its distance guide cancelling Riss's participation in Mileage Guide 100.<sup>1</sup> Pet. App. 5b, 7b-8b; J.A. 11-14, 25-27.

In November 1989, Riss filed a bankruptcy petition and became known as petitioner Security Services, Inc. Pet. App. 4b. Petitioner's auditors compared the invoices Riss had originally submitted to shippers with Riss's tariffs, concluded that Riss had apparently undercharged respondent for transportation services, and sought to collect those undercharges. *Id.* at 5b. When respondent refused to pay, petitioner filed suit in federal district court. *Id.* at 2b, 5b.

The district court granted summary judgment for respondent. Relying on the ICC's decision in *Jasper Wyman*, the district court concluded that Riss's failure to participate in the HGCB distance guide meant that it did not have an effective tariff on file with the ICC at the time of the disputed charges and therefore had no basis for collecting undercharges. Pet. App. 9a-10a, 15a; *id.* at 9b-10b.

The court of appeals affirmed. It stated that, applying the ICC's void-for-nonparticipation rule, 49 C.F.R. 1312.4 (d), "Riss's tariff was void when [respondent] made its shipments in 1986 through 1989 because any power of attorney [Riss] previously may have issued became ineffective in 1985, and a void tariff cannot support the

<sup>1</sup> As the court of appeals explained, "[a]gents filing governing separate tariffs, such as [HGCB], are required to provide a list of participating carriers, either within the tariff itself or in a separate participating carriers tariff. When it is necessary to amend this list due to e.g., the cancellation of a carrier's participation, such amendment is accomplished by issuing a supplement to the tariff in which the list appears, as [HGCB] did in this case." Pet. App. 8b-9b (citations omitted). HGCB's Supplement No. 17 to Tariff ICC HGB 101-B indicates that a "#" symbol "cancel[s] [a] carrier's participation." J.A. 24. Riss's name appears with a "#" next to it. J.A. 14.

undercharges Riss seeks.”<sup>2</sup> Pet. App. 15b (citation omitted). The court then turned to petitioner’s claim that the ICC’s rule could not be applied according to its terms, because it violates the conditions established by *ICC v. American Trucking Ass’ns*, 467 U.S. 354 (1984), for the ICC to exercise discretionary power to reject an effective tariff retroactively. Pet. App. 15b-16b. In *American Trucking Ass’ns*, the Court held that the ICC may retroactively reject a tariff only when that action “further[s] a specific statutory mandate” and is “directly and closely tied to that mandate.” 467 U.S. at 367.

The court concluded that, although Section 1312.4(d) does retroactively reject a tariff when a carrier fails to have an effective concurrence or power of attorney, that rule satisfies both prongs of the *American Trucking Ass’ns* test. First, the rule furthers the “specific statutory mandate” that empowers the Commission to determine the information that is required to be included in a tariff.<sup>3</sup> Pet. App. 18b-19b. Second, the rule is “directly and closely tied” to that mandate, because the rule “defines the essential elements of an effective tariff,” and clearly states that failure to include those elements renders a tariff void. *Id.* at 19b-20b, quoting *Freightcor Services, Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563, 1571 (5th Cir. 1992), cert. denied, 113 S. Ct. 979 (1993). Accordingly, the court upheld the Commission’s void-for-nonparticipation rule.

2. *The Eighth Circuit’s ruling.* The Eighth Circuit took a different approach in upholding the validity of the

<sup>2</sup> The court rejected petitioner’s contention that it had validly participated in the HGCB Mileage Guide, finding that HGCB’s cancellation of Riss’s participation rendered any power of attorney that Riss had previously given to HGCB ineffective. Pet. App. 11b-15b. Petitioner does not claim in this Court that it effectively participated in the HGCB Mileage Guide. Pet. Br. 9 n.4.

<sup>3</sup> Under 49 U.S.C. 10762(a) (1), “[t]he Commission may prescribe other information that motor common carriers shall include in their tariffs.”

void-for-nonparticipation rule. In *Atlantis Express, Inc. v. Associated Wholesale Grocers, Inc.*, 989 F.2d 281 (1993), the Eighth Circuit held that the rule does not result in the retroactive rejection of a filed tariff. The court explained that “[i]n the absence of distances to accompany distance rates, there simply is no tariff on file, notwithstanding the ICC’s acceptance and publication of the [per-mile] rates”; in other words, “[t]he [per-mile] rates are meaningless without the distances.” *Id.* at 283. Because the carrier is required to establish an effectively filed tariff that fully discloses rates, the court held that the failure to participate in the distance guide defeated the carrier’s undercharge claim.<sup>4</sup> *Id.* at 283-284; see *F.P. Corp. v. Twin Modal, Inc.*, 989 F.2d 285 (8th Cir. 1993), cert. denied, 114 S. Ct. 95 (1993).

3. *The D.C. Circuit’s ruling.* The D.C. Circuit, however, set aside the Commission’s *Jasper Wyman* decision. *Overland Express, Inc. v. ICC*, *supra*. The *Overland Express* court concluded that Section 1312.4(d) effects a retroactive rejection of a tariff, because, in the court’s view, a tariff may be effective despite its procedural or substantive imperfections. 996 F.2d at 360. “A regulation that purports to make a tariff [contained in ICC files] ‘void’ or ‘ineffective’ if a carrier fails to follow a procedural rule” is thus subject to the *American Trucking Ass’ns* test. *Ibid.*

Applying the two-part *American Trucking Ass’ns* test, the court of appeals concluded that the void-for-nonparticipation rule does not advance a specific statutory mandate; it advances instead a regulatory policy of the Commission. 996 F.2d at 362. Even if the rule does further a statutory mandate, the court of appeals held, the “draconian remedy” of retroactive rejection is not “di-

<sup>4</sup> Because it held that the ICC’s rule did not retroactively reject a tariff, the Eighth Circuit found it unnecessary to apply the *American Trucking Ass’ns* test. *Atlantis Express*, 989 F.2d at 283.

rectly and closely tied" to a statutory power, because less drastic remedies (such as damages) are available. *Ibid.*<sup>5</sup>

### SUMMARY OF ARGUMENT

A. The filed rate doctrine serves to "render rates definite and certain" by establishing the filed rate as the rate that "governs the legal relationship between shipper and carrier." *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126, 132 (1990). Under the filed rate doctrine, carriers must charge only the rates they have filed with the ICC.

Congress has directed the ICC to regulate and enforce the system of tariff filing that underpins the filed rate doctrine. The Commission permits a carrier to adopt tariffs filed by others in lieu of submitting its own tariffs to the agency, provided the carrier formally participates in those other tariffs. That requirement ensures that each carrier fulfills its duty to set its own rates. When a carrier fails to participate in a referenced tariff in the specified way, the carrier has not adequately disclosed its rates. The carrier has thus failed to satisfy the threshold requirement of the filed rate doctrine: the establishment of its own rates on file with the Commission.

That principle applies to carriers that establish the distance portion of their mileage rates by reference to a separately filed distance guide. To have a filed rate, a carrier must be a participant in the distance guide. Carriers and shippers are bound by the filed tariff; there is nothing unusual about the participation rule that requires an exception to that principle. Under the filed rate doctrine, shipper, carriers, and the public are conclusively deemed to be on notice of the materials on file at the Commission. And a carrier may not collect undercharges based on partially filed rates, which is all that a carrier

<sup>5</sup> Two circuits have followed the holding of *Overland Express, Security Services, Inc. v. P-Y Transp. Inc.*, 3 F.3d 966 (6th Cir. 1993); *Brizendine v. Cotter & Co.*, 4 F.3d 457 (7th Cir. 1993).

has when it allows its participation in a distance guide to lapse.

The rule that a tariff is effectively on file despite procedural imperfections or substantive violations of the Act does not apply in this case. While minor stylistic deviations do not result in treating a tariff as if it were never filed, a violation of the participation rule is not a matter of style. It deprives the tariff of definite, certain, and adequately disclosed rates. Nor can this case be equated to one in which an unlawful rate is filed. In that situation, the Court has held that a shipper who paid the unlawful rate must show actual injury in order to recover overcharges from the carrier. But where, as here, the carrier affirmatively relies on its tariff to collect additional sums, the carrier cannot invoke the filed rate doctrine unless its rate is actually and effectively filed.

B. The Commission's void-for-nonparticipation rule does not result in the retroactive rejection of a tariff. When a carrier fails to establish or maintain participation in the referenced tariff, the rule describes the *prospective* consequences of that violation. Those consequences are readily apparent to the carrier and the public at the time that participation lapses. The rule does not reach back and invalidate applications of the tariff to times when the tariff was validly in force. The fact that the omission may not be noticed until later and the rule is not invoked until that point does not make its application retroactive. The operation of the rule is similar to the effect of an expiration date in a tariff. After its expiration date, a tariff is no longer in force, and cannot support lawful charges. The same is true of a tariff with a lapsed participation. The result in neither case, however, is accurately described as retroactive.

C. Even if the void-for-nonparticipation rule is treated as retroactive, it is valid under *ICC v. American Trucking Ass'ns*, 467 U.S. 354 (1984). The rule furthers the Commission's statutory mandate to determine the content and form of tariffs and to ensure adequate

disclosure of the rates available to shippers. The rule is also directly and closely tied to that mandate; it is necessary to provide incentives to carriers to maintain effective relationships with the publishers of referenced tariffs. In light of the ease with which carriers may comply with the rule and the important purposes it serves, the rule is a reasonable exercise of the Commission's discretion.

### ARGUMENT

#### A CARRIER CANNOT COLLECT UNDERCHARGES BASED ON MILEAGE RATES THAT REFER TO A DISTANCE GUIDE IN WHICH THE CARRIER IS NOT A PARTICIPANT

##### A. The Filed Rate Doctrine Precludes The Collection Of Rates That Are Not Stated In A Tariff

1. A cornerstone of the Interstate Commerce Act is the requirement that shippers and carriers observe the filed rate. The Act specifies that carriers may provide transportation "only if the rate \* \* \* is contained in a tariff that is in effect \* \* \*." 49 U.S.C. 10761(a). The Act also requires carriers to "publish and file" tariffs "containing \* \* \* rates" with the Commission. 49 U.S.C. 10762(a)(1). As this Court recently reaffirmed, under the filed rate doctrine created by those requirements, "[i]gnorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed." *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 127 (1990), quoting *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915); see *Arizona Grocery Co. v. Atchison, T.&S.F. Ry.*, 284 U.S. 370, 384 (1932) ("[T]he statute require[s] the filing and publishing of tariffs specifying the rates adopted by the carrier, and ma[kes] these the *legal* rates, that is, those which must be charged to all shippers alike."); *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 163 (1922) ("The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff.").

In order for a carrier to invoke the filed rate doctrine, the carrier must have filed a tariff with the Commission that adequately discloses its rates. Rates cannot be made "definite and certain," *Maislin*, 497 U.S. at 126, quoting *Arizona Grocery Co. v. Atchison, T.&S.F. Ry.*, 284 U.S. at 384, absent a tariff that permits the public to determine what those rates are. As the Court has explained, if there is no tariff on file that sufficiently discloses rates, "it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory, . . . and virtually impossible for the public to assert its right to challenge the lawfulness of existing proposed rates." *Maislin*, 497 U.S. at 132, quoting *Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986). The task of "prescrib[ing] the form and manner of publishing, filing, and keeping tariffs open for public inspection" is expressly delegated to the Commission. 49 U.S.C. 10762(b)(1).

For more than 50 years the Commission has permitted carriers to adopt or incorporate rates or rate components contained in tariffs filed by an agent. Carriers choosing to file rates in that manner must formally participate in those other tariffs through a power of attorney. 49 C.F.R. 1312.27; 49 C.F.R. 1312.4(d). That participation requirement furthers the statutory mandate that each carrier is responsible for setting and filing its own rates. It also reflects basic principles of agency law, by ensuring that a carrier is not bound by the actions of another person unless the carrier has assented to the other's actions through a continuing agency relationship. See, e.g., 1 Restatement (Second) of Agency §§ 15, 26 cmt. f, 118 (1958).

In this case, Riss attempted to establish its rates by setting its per-mile charges in its own tariff and by relying on a particular distance guide filed by HGCB to supply the mileages between origination and destination points. Absent certainty about those mileages, it would be im-

possible to determine Riss's rates. Proper participation was therefore indispensable for Riss to have established rates that are "definite and certain" and that meet the filed rate doctrine's threshold requirement of having rates on file with the Commission.<sup>6</sup>

Consideration of the process for establishing rates by participating in a tariff filed by an agent makes evident the need for proper participation. HGCB updates and revises each mileage guide periodically, to reflect new or different routings. Those revisions may produce changes in the distances (and, therefore, in the charges assessed to shippers). HGCB also publishes guides that compute distances by different techniques.<sup>7</sup> When HGCB publishes a revised guide, it notifies participating carriers of the proposed changes, prior to the effective date, so that those carriers may decide whether to use the new mileage guide (and adjust their per-mile rate components as necessary to avoid any unwanted rate changes) or to select a different mileage guide or another means of computing distances for their mileage rates. Without knowledge of what guide the carrier is authorized to incorporate, the

<sup>6</sup> The issue in this case differs from the issues in other recent motor carrier cases that this Court has considered. In *Maislin*, 497 U.S. at 129-131, there was no dispute about whether the carrier had effectively filed its rates in a tariff with the ICC; rather, the issue was whether the ICC had permissibly made it an unreasonable practice for a carrier to collect those rates after it had quoted and billed lower rates that the shipper reasonably believed would be embodied in filed tariffs. Similarly, in *Reiter v. Cooper*, 113 S. Ct. 1213, 1216 (1993), the issue was "whether, when a shipper defends against a motor common carrier's suit to collect tariff rates with the claim that the tariff rates were unreasonable, the court should proceed immediately to judgment on the carrier's complaint without waiting for the [Commission] to rule on the reasonableness issue."

<sup>7</sup> For example, Mileage Guide 100 provides distances between named points. HGCB's Zip Code Guide, by contrast, provides distances from the geographic center of each three-digit zip code territory (or combined territories).

ICC, shippers, and the public cannot accurately compute charges.<sup>8</sup>

A carrier that does not confirm its selection of a particular guide (by paying the appropriate participation fee and providing the required power of attorney) has not fulfilled its responsibility to determine its own rates. The tariff filings available to the public will reflect that abdication of responsibility. Tariff agents are required to list in their tariffs the names of the carriers participating in those tariffs. 49 C.F.R. 1312.10(a) and (b); 1312.13(c); 1312.25; 1312.27(e).<sup>9</sup> When a carrier's participation in the referenced tariff is cancelled, the list must be amended through a public filing to reflect that cancellation. 49 C.F.R. 1312.10(a) and (b)(2); 1312.17(b); 1312.25 (d); see Pet. App. 8b-9b. That requirement serves the statutory disclosure function, by enabling tariff users to identify the basis for determining rates. If a distance

<sup>8</sup> Consider, for example, three different mileage guides: HGCB Tariff ICC HGB 100-D, effective June 1, 1990 (1990 Mileage Guide 100); HGCB Tariff ICC HGB 100-E, effective April 12, 1993 (1993 Mileage Guide 100); and HGCB Tariff ICC HGB 105-C, effective December 3, 1990 (1990 Zip Code Guide). The impact of selecting a particular guide is illustrated by the different mileages for journeys originating in Washington, D.C., and terminating in the six destinations listed below:

	1990 Mileage Guide 100	1993 Mileage Guide 100	1990 Zip Code Guide
Washington DC to:			
Washington GA	537	540	548
Washington NC	261	261	235
Washington PA	237	239	230
Washington Ct Hse OH	412	410	393
Waterbury CT	313	312	318
Waterloo IA	954	962	954

<sup>9</sup> For example, 49 C.F.R. 1312.13(c) states that "[u]nless a separate participating carrier's tariff list is filed, a list of the participating carriers shall be provided." 49 C.F.R. 1312.25 sets forth the same requirement of a list if a separate participating carrier tariff is filed.

guide tariff indicates that a particular carrier is not a participant in that tariff, or if its participation has been cancelled, the public has notice that the purported measure of distances selected by that carrier is not a valid measure. The effect is similar to a carrier's reference to another tariff that has expired: the basic statutory requirement of publishing rates is not met because the tariffs on file do not produce a means of calculating a rate. Under those circumstances, the filed rate doctrine cannot support a collection action, because there is no "filed rate" published in an ICC tariff.<sup>10</sup>

2. The court of appeals in *Overland Express* expressed the view that it would be an "extraordinary step" for a shipper to check the distance guide to determine whether a carrier is properly participating in that guide, 996 F.2d at 360, and that it would therefore undermine the filed rate doctrine to apply the ICC's rule as written. *Id.* at 361. That view is unfounded. As a practical matter, there is no unusual difficulty in consulting the relevant pages of the distance guide to determine whether a particular carrier is a participant. A person who is interested in calculating the carrier's rates will have to turn to that

<sup>10</sup> Amicus *Overland Express, Inc.* argues (Br. 12-21) that the ICC's regulations, as revised in 1984, do not require carriers to participate in distance guides, and therefore do not carry the consequence that a tariff is void if the carrier does not execute a power of attorney or concurrence. See 49 C.F.R. 1312.4(d). That claim is contrary to the text of 49 C.F.R. 1312.27(e), which states that "[c]arriers participating in tariffs which refer to, and are governed by, separate tariffs \* \* \* shall also participate in those governing separate tariffs." Moreover, it also conflicts with the ICC's interpretation of its regulations. See *Jasper Wyman*, 8 I.C.C.2d at 249-252 (indicating that a carrier using a separately filed distance guide must participate in that guide). An agency's interpretation of its regulations is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); see *Stinson v. United States*, 113 S. Ct. 1913, 1919 (1993) (collecting cases). No such showing has been made here.

guide for information about mileages, and in this case the guide prominently warns that its use is restricted to carriers that are listed as participants in it.<sup>11</sup> Understanding that language requires no special familiarity with tariffs, and to the extent that reading the tariff requires knowledge of ICC rules, it is no different from any other tariff inquiry. "[T]here are commercial services providing up-to-the-minute details of the carrier's rate schedule" and those services can assist shippers in watching and interpreting the tariffs. *Maislin*, 497 U.S. at 131 n.12.

More fundamentally, as a legal matter, the court of appeals' rationale conflicts with a key aspect of the filed rate doctrine. "The shipper's knowledge of the lawful rate is conclusively presumed." *Kansas City Southern Ry. v. Carl*, 227 U.S. 639, 653 (1913); *Reiter v. Cooper*, 113 S. Ct. 1213, 1219 (1993) ("The filed rate doctrine embodies the principle that a shipper cannot avoid payment of the tariff rate by invoking common-law claims and defenses such as ignorance" of the filed rate.). In line with that principle, the public is charged with "constructive notice" of the delisting of a carrier as a participant. *Jasper Wyman*, 8 I.C.C.2d at 254. The filed rate doctrine has never required proof that it would be easy to read the filed tariff or to interpret its symbols and definitions. What it has required is disclosure of rates to a person who reviews the filed material. When a carrier's tariff is incomplete by virtue of its explicit failure to provide a distance component for its mileage charges, the carrier has not filed its rates. Under the filed rate doctrine, the carrier may

<sup>11</sup> The HGCB Mileage Guide states (J.A. 35):

NOTE: THIS MILEAGE GUIDE MAY NOT BE EMPLOYED BY A CARRIER AS A GOVERNING PUBLICATION FOR THE PURPOSE OF DETERMINING TRANSPORTATION RATES BASED ON MILEAGE OR DISTANCE UNLESS CARRIER IS SHOWN AS A PARTICIPANT IN THE ABOVE NAMED TARIFF.

not rely on partially disclosed rates to collect undercharges.<sup>12</sup>

3. The failure to participate in the distance guide is not the sort of deficiency in tariff-filing procedure that is overlooked in determining whether there is a "filed rate" under 49 U.S.C. 10761(a). It is true that this Court "long ago rejected the view that a tariff on file with the Commission and never rejected by it should be disregarded or treated as nonexistent merely because of some element of substantive unlawfulness in the rate, or some irregularity in the tariff filing formalities." *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304, 1308 (D.C. Cir. 1981) (citations omitted), cert. denied, 456 U.S. 905 (1982). But neither that principle nor the cases establishing it, *Berwind-White Coal Mining Co. v. Chicago & Erie R.R.*, 235 U.S. 371 (1914), and *Davis v. Portland Seed Co.*, 264 U.S. 403 (1924), free a carrier from the baseline requirement of filing a tariff that establishes a rate.<sup>13</sup>

In *Berwind*, a carrier sought to collect demurrage charges, based on its filed tariffs, rules, and letter to the Commission setting forth its demurrage rates. The Court

<sup>12</sup> Petitioner argues (Br. 13) that the "net result" of the Commission's position is to permit "a secret rate agreement to control interstate transportation," thus subverting the filed rate doctrine. That is incorrect. The carrier has the obligation to file its rates, and when it has failed to do so, it cannot claim protection under the Act's policy to require fully disclosed (*i.e.*, filed) rates. By enforcing requirements designed to achieve adequate disclosure of rates, the *Jasper Wyman* approach supports, not undercuts, the filed rate doctrine.

<sup>13</sup> *Genstar* did not suggest otherwise. The court held that when a "shipper has been charged no more than the rate reflected in the tariff on file," its remedies are measured by any harm it suffered from the irregularity in the filing. 665 F.2d at 1308. The underlying principle is that a shipper may not recover damages based on irregular filings without establishing cognizable harm (for example, that the rates charged were unreasonable). That principle is fully compatible with a rule that a carrier may not recover alleged undercharges without first establishing that it has filed rates.

rejected the claim that those documents "were not sufficiently formal to comply with the law and hence afforded no ground for allowing demurrage." 235 U.S. at 375. It explained that "[t]he documents were received and placed on file by the Commission without any objection whatever as to their form and it is certain that as a matter of fact they were adequate to give notice." *Ibid.* *Berwind* does not hold that any defect in filing will be excused, as long as a document is sent to the Commission. The objections to the "form" of the tariff in *Berwind* went to stylistic matters such as the "size of the type in which the tariffs are to be printed." *Chicago & Erie R.R. v. Berwind-White Coal Mining Co.*, 171 Ill. App. 302, 307 (1912).<sup>14</sup> The shipper did not claim that the tariff lacked sufficient information to produce a rate, or that the tariff violated regulations governing the requirements for making a tariff effective. And, while it was "certain" in *Berwind* that the tariffs adequately provided notice, here, a shipper who diligently researched the tariffs would be unable to conclude that the reference to the distance guide was a valid means to set rates, because the guide itself challenged that reference.

In *Davis v. Portland Seed Co.*, the carrier's tariff charged less for a longer distance than for a shorter distance over the same route, in violation of former 49 U.S.C. 10726(c).<sup>15</sup> A shipper who was assessed the higher charge for the shorter haul sought reparations on the theory it should have been charged no more than the

<sup>14</sup> The Commission has similarly held that stylistic matters do not invalidate a tariff. See *Heavy and Specialized Carriers Tariff Bureau v. U.S.A.C. Transport, Inc.*, 302 I.C.C. 487, 488 (1957) (omission of symbol indicating change in rates does not invalidate tariff); *Atlantic Commission Co. v. Bangor & Aroostook R.R.*, 266 I.C.C. 651, 668 (1946) ("failure to symbolize" does not render tariff inapplicable).

<sup>15</sup> That provision was repealed in Pub. L. No. 96-448, Tit. II, § 220, 94 Stat. 1928 (1980).

lower, long-haul rate. 264 U.S. at 413-415. The Court held that, despite the substantive unlawfulness of the higher rate, the shipper could not treat it as a nullity. *Id.* at 424-425. To establish a right to reparations, the shipper had to show financial loss from application of the higher rate. *Id.* at 425.

*Davis* thus holds that the remedy for a substantively unlawful tariff rate is measured by the shipper's actual injury. The decision does not indicate that when a carrier has not established a filed rate at all, because of its failure to comply with Commission regulations governing disclosure of rates, the carrier is free to impose what it intended to be the tariff rate.<sup>16</sup> The tariffs of a carrier in the latter situation are "not merely 'technically deficient,' but, rather, lack[] effective provisions necessary to calculate freight charges." *Jasper Wyman*, 8 I.C.C.2d at 259. Whatever showing might be required for a shipper to recover damages as the result of the application of such a tariff, a carrier cannot rely on its incomplete tariff to assert undercharge claims.

#### B. The ICC's Void-For-Nonparticipation Rule Does Not Effect A Retroactive Rejection Of A Tariff

Petitioner contends that the ICC's void-for-nonparticipation rule declares tariff rates void retroactively, and that it therefore must satisfy the two-part test of *ICC v. Amer-*

<sup>16</sup> See *Jasper Wyman*, 8 I.C.C.2d at 260; *Range Tariffs of All Motor Common Carriers—Show Cause Proceeding*, No. 40887 (ICC, served Aug. 4, 1993), slip op. 14 n.40 (distinguishing *Berwind, Davis*, and *Genstar* from the situation involved in *Jasper Wyman*, noting that in those cases, "[t]here [was] no Commission regulation stating that a tariff failing to comply with the disclosure requirements would be void as a matter of law, as there is in 49 CFR 1312.4(d) for tariffs which fail to meet the tariff participation requirements"); *Wonderoast, Inc.*, 8 I.C.C.2d at 276 (*Berwind, Davis*, and *Genstar* "addressed the question of irregularity in the filed rate and rejected such irregularity as a basis for nonapplication of the filed rate").

*ican Trucking Ass'ns*, 467 U.S. 354 (1984). Pet. Br. 6, 9-10 & n.5. There is, however, nothing retroactive about the operation of the ICC's rule, and it is thus not subject to the *American Trucking Ass'ns* test.

1. The ICC's rule states that "a carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed," and that "[a]bsent effective concurrences or powers of attorney, tariffs are void as a matter of law." 49 C.F.R. 1312.4(d). The rule thus describes prospective consequences of a carrier's action. It is triggered when the carrier fails to enter or to renew appropriate arrangements with the tariff agent; its effect is revealed in the agent's public filing that cancels the carrier's participation. Neither the rule nor the public notice of cancellation requires specific ICC action, and neither has any effect on the carrier's rates prior to the effective date of the cancellation notice.<sup>17</sup>

The impact of the rule is therefore comparable to the effect of an expiration date in a tariff.<sup>18</sup> As of the expiration date, unless the carrier takes steps to extend it, 49 C.F.R. 1312.23(b), 1312.39(d), or to file a new tariff, the carrier is left with no effective tariff on file. The ICC does not cancel or reject the tariff at that time; nor is the tariff necessarily physically removed from the Commission's files. Nevertheless, the expired rates become inap-

<sup>17</sup> A truly retroactive rejection would invalidate the tariff as to shipments made while the tariff was effective. For example, in this case, the court of appeals accepted "as true the inferences that an effective power of attorney existed from the time Riss issued ICC RISS 501-B in 1984 through HGB's cancellation of its participation in 1985." Pet. App. 16b. If the ICC's rule invalidated the tariff as to that period, it would have a retroactive effect. But that is not the case, for the rule has no impact on the tariff before issuance of the notice of cancellation. See *Jasper Wyman*, 8 I.C.C.2d at 258.

<sup>18</sup> The ICC's rules expressly authorize the filing of a tariff with a provision showing when the tariff will expire. 49 C.F.R. 1312.23(a).

plicable to shipments that occur after the expiration date. See *Constitution Stone Co. v. Baltimore & Ohio R.R.*, 231 I.C.C. 562 (1939) (published rate inapplicable when cancelled, even if erroneously); *Glidden Co. v. Chesapeake & Ohio Ry.*, 229 I.C.C. 599 (1938) (same). The same self-executing result occurs when a carrier's participation in a distance guide is cancelled, and the tariff contains no other means for computing rates.<sup>19</sup>

The ICC has long informed the industry of those features of the tariff system. In a release addressed to motor carriers in 1939, the Commission emphasized that when a carrier's participation in another tariff is cancelled, "[s]uch cancellation makes the use of rates in such tariffs by that carrier unlawful." 4 Fed. Reg. 4,440 (1939). The Commission added that "[i]t is likewise unlawful for common carriers to perform interstate transportation without lawful rates on file covering the services performed." *Ibid.* The Commission therefore reminded carriers of their obligation to arrange for the filing of an effective tariff upon cancellation of participation in an agency tariff. *Ibid.* The Commission did not characterize its rule as a retroactive remedy, but as a guideline for complying with the statutory filed rate requirements.<sup>20</sup> Such a provision is clearly valid as an exercise of Commission discretion under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). See *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1401 (1992).

2. The void-for-nonparticipation rule is thus quite different from the rule reviewed in *ICC v. American Truck-*

<sup>19</sup> When notice is given that a carrier's participation will be cancelled, it is easy for the tariff to be amended to restore a carrier's participation in a tariff and to ensure continuous applicability of the participation. 49 C.F.R. 1312.39(a) (permitting restoration of a carrier's participation on five days' notice).

<sup>20</sup> The relevant portion of the release is reprinted in the appendix to this brief. App., *infra*, 12a-13a.

*ing Ass'ns.* In that case, the Commission had announced a new remedy that would apply when carriers filed tariffs in substantial violation of rate-bureau agreements: the Commission would, in its discretion, retroactively reject the tariffs. 467 U.S. at 357-358. The explicit purpose of the Commission's remedy was to render "effective tariffs" that were found in its public files "void *ab initio*," so that shippers could bring actions to recover "over-charges" that had been made under the rejected tariffs. *Id.* at 355, 358, 367. The rule in *American Trucking Ass'ns* was retroactive for three reasons: it operated on tariffs that were valid on their face, it was expressly intended to alter those tariffs' past applications to shippers, and it depended for its enforcement on a later Commission determination that the carrier's violation existed and was serious.

None of those characteristics exists in this case. The void-for-nonparticipation rule defines the future consequences of a carrier's conduct, and it can be applied by reviewing the texts of the filed tariffs. The rule does not alter the charges applicable to past shipments; rather, it affects only shipments made after a carrier's participation in the distance guide is cancelled. Finally, the rule does not depend for its enforcement on a subsequent adjudication. Any person who consults the tariffs, and learns that a carrier had referred to a distance guide in which the carrier's participation was cancelled, understands that that tariff does not govern future shipments. That the violation may not be discovered until sometime after its occurrence does not make the rule retroactive. In short, the essential elements of a retroactive rejection are not present in this case.<sup>21</sup>

<sup>21</sup> There is no policy reason to treat the ICC's rule as a retroactive rejection of a tariff. A rule that permits the parties to arrange their conduct in the future and that declares the consequences of facts that are evident and available to all interested persons at the time of a transaction does not have the expectation-upsetting consequences of a retroactive rule. Thus, while it may be true that a

**C. The ICC's Rule, If Viewed As Having Retroactive Effects, Is Valid Under This Court's *American Trucking Ass'ns* Test**

Even on the assumption that the void-for-nonparticipation rule has the effect of retroactively rejecting a tariff, that consequence does not invalidate the rule. As the court of appeals found, the rule is permissible under *American Trucking Ass'ns*, because it promotes a specific mandate of the Act and is directly and closely tied to that mandate.

1. The void-for-nonparticipation rule "further[s] a specific statutory mandate of the Commission." *American Trucking Ass'ns*, 467 U.S. at 367. The ICC has an express mandate to determine the information that is required to be disclosed in a tariff. 49 U.S.C. 10762(a)(1) and (b)(2). That power is central to the attainment of a tariff filing system that adequately discloses rates and that restricts entry into secret arrangements between shippers and carriers. The ICC's rule in this case is a mechanism to ensure that tariffs reveal the applicable rates. By requiring "disclosure of the identity of the carriers participating in every tariff," the rule thus directly furthers the ICC's power to define the contents of tariffs. Pet. App. 19b, quoting *Freightcor*, 969 F.2d at 1571.

Petitioner contends that a statutory mandate contained in 49 U.S.C. 10762 itself cannot support retroactive rejection of a tariff under the *American Trucking Ass'ns* test. Br. 5-6, 10-14. According to petitioner, "Congress established 49 U.S.C. § 10762(e) to govern *all* rejections of tariffs established under rules promulgated pursuant to

carrier could be exposed to overcharge claims for having assessed rates based on a tariff that is void under the ICC's rule, Pet. App. 18b, that does not mean that the rule accomplishes a retroactive rejection of a tariff (any more than would a rule exposing a carrier to potential overcharge claims for having billed shippers under an expired tariff).

§ 10762." <sup>22</sup> Br. 10. The power contained in Section 10762(e), however, does not exclude other exercises of authority to enforce the Act. The Act states that "[e]numeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle." 49 U.S.C. 10321(a). As the Court explained in *American Trucking Ass'ns*, the ICC is not limited to its express rejection powers, but may take additional action when it is "reasonable" and "direct[ly] adjunct" to its sources of authority; this latitude is necessary to ensure adequate implementation of Congress's goals with respect to specific problems the legislature may not have foreseen. 467 U.S. at 365. <sup>23</sup>

2. The void-for-nonparticipation rule is also "directly and closely tied" to that mandate. 467 U.S. at 367. The rule that carriers must participate in referenced tariffs would have little force if carriers were free to ignore it and yet treat their rates as properly filed. It is impractical to require the ICC to review every filed tariff to determine whether all cross-references are supported by par-

<sup>22</sup> 49 U.S.C. 10762(e) states: "The Commission may reject a tariff submitted by a common carrier under this section if that carrier violates this section or regulation of the Commission carrying out this section." In *American Trucking Ass'ns*, the Court held that this provision authorizes the Commission to reject a tariff only when it is tendered for filing. 467 U.S. at 361-364.

<sup>23</sup> In *Overland Express*, the court of appeals suggested that the void-for-nonparticipation rule furthers only a "regulatory policy" that is not required by statute, and hence cannot satisfy the *American Trucking Ass'ns* test. 996 F.2d at 362. The ICC's participation requirement, however, furthers the role specifically assigned by Congress to the Commission of bringing uniformity and clarity to the tariff filing system. The Act states that the ICC "shall prescribe the form and manner of publishing, filing and keeping tariffs open." 49 U.S.C. 10762(b)(1) (emphasis added). Nothing in *American Trucking Ass'ns* precludes the Commission from crafting remedies for policies formulated under that congressional mandate, particularly when those policies support the "statutory objective[.]" 467 U.S. at 366, of the filed rate doctrine itself.

ticipations. The task would be particularly daunting since participations may need to be renewed periodically or upon revision of the cited tariff, and a carrier's tariff that was in compliance when filed may later become deficient. The ICC's rule thus promotes carrier responsibility in the establishment of rates, by ensuring that carriers have an adequate incentive to keep their cross-references to other tariffs current and effective.<sup>24</sup>

Here, as in *American Trucking Ass'ns*, 467 U.S. at 370, "it is within the Commission's discretion to decide that the only feasible way to fulfill its mandate" is to regard a tariff as void when a cross-reference lapses. Damages actions that would seek to recover amounts by which shippers were injured by lapsed references are an inefficient and costly way to enforce the requirement of participation. The ICC would incur significant administrative burdens in adjudicating those cases, and would have no assurance that the potential for damages claims would give carriers sufficient incentive to comply. Moreover, the Commission has long indicated that the responsibility for complying with the participation requirement lies with carriers, see p. 22, *supra*, and the allocation of responsibility to carriers under the void-for-nonparticipation rule is consistent with that view.

Contrary to the suggestion of the *Overland Express* court, 996 F.2d at 362, the absence of hearing procedures under the void-for-nonparticipation rule is not a basis for invalidating it under *American Trucking Ass'ns*. The fact

<sup>24</sup> The ICC has for many years lacked the resources to conduct a "comprehensive examination program" of tariffs placed in its files. *American Trucking Ass'ns*, 467 U.S. at 360 n.4. The Commission receives more than 1 million motor carrier tariffs each year, see 1985 ICC Annual Report 114 (1,180,153 tariffs received); 1992 ICC Annual Report 113 (1,159,106 tariffs received), and cannot reasonably administer a program that would entail initial examination and periodic review of each document. A mechanism to place the burden of compliance on carriers is essential to make the system function.

that carriers can readily comply with the rule, and are on notice when they are out of compliance, see *Jasper Wyman*, 8 I.C.C.2d at 253-254, is a factor that supports its reasonableness. See *American Trucking Ass'ns*, 467 U.S. at 370-371 (noting that carriers that violate rate bureau agreements "will be aware of their transgressions" and that concerns that inadvertent violations will be penalized "are largely unfounded"). And, unlike the rule at issue in *American Trucking Ass'ns*, the rule here does not require the determination of facts that are unavailable from the Commission's public files, nor does it call for the exercise of Commission discretion. The automatic operation of the rule is thus consistent with its simplicity and with the ease of carrier compliance.

### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III  
*Solicitor General*

HENRI F. RUSH  
*Acting General Counsel*

LAWRENCE G. WALLACE  
*Deputy Solicitor General*

ELLEN D. HANSON  
*Senior Associate  
General Counsel*

MICHAEL R. DREEBEN  
*Assistant to the Solicitor  
General*

JUDITH A. ALBERT  
THEODORE K. KALICK  
*Attorneys  
Interstate Commerce  
Commission*

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## APPENDIX

### The Interstate Commerce Act, Title 49, United States Code

#### § 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title [49 U.S.C. § 10501 *et seq.*] shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter [49 U.S.C.S. § 10761 *et seq.*]. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

(b) The Commission may grant relief from subsection (a) of this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title [49 U.S.C.S. § 10101]. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers.

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#### § 10762. General tariff requirements

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate

(1a)

Commerce Commission under chapter 105 of this title [49 U.S.C.S. § 10501 *et seq.*] (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year or a motor carrier of property providing transportation under a certificate to which the provisions of Section 10922(b)(4)(E) of this title apply may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

(2) Carriers that publish tariffs under paragraph (1) of this subsection shall keep them open for public inspection. A rate contained in a tariff filed by a household goods common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of chapter 105 [49 U.S.C.S. § 10521 *et seq.*, 10541 *et seq.*, or 10561 *et seq.*] shall be stated in money of the United States. A tariff filed by a motor or water contract carrier or by a freight forwarder providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of that chapter [49 U.S.C.S. § 10521 *et seq.*, 10541 *et seq.*,

or 10561 *et seq.*], respectively, may not become effective for 30 days after it is filed.

(b)(1) The Commission shall prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection under this section.

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## Regulations of the Interstate Commerce Commission, 49 C.F.R.

### § 1312.4 Filing tariffs.

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(d) **Concurrences and powers of attorney.** Concurrences and powers of attorney shall not be filed with the Commission. However, a carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law. Should a challenge to a tariff be made on this basis, carriers will be required to submit the necessary proof. See also § 1312.10.

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### § 1312.10 Powers of attorney, concurrences, transfer of agent. [See also § 1312.4(d)]

(a) **Powers of attorney.** Powers of attorney may be given by a carrier to a carrier or an agent for the purpose of publishing and filing tariffs. A power of attorney may be given by Class III rail carriers to larger carriers with which they connect or by rail subsidiaries to parent rail carriers authorizing the larger or parent rail carriers to publish tariffs, to give and receive concurrences, and to give powers of at-

torney to agents on behalf of the Class III or subsidiary rail carrier. The power may be as broad or limited as expressed in the document, and alternate agents may be named. Powers of attorney shall not be filed at the Commission, but shall be maintained and produced if requested by any person. Revocation or amendment of the power of attorney shall be reflected through lawfully published tariff revisions effective concurrently. In the event of failure to so revise the applicable tariff or tariffs, the rates in such tariff or tariffs will remain applicable until lawfully changed. If the scope of a power of attorney is questioned by any person, the document shall be produced.

(b) **Concurrences.** (1) A concurrence is used to show that one carrier has agreed to participate in joint rates or provisions published in a tariff filed by another carrier or agent. A concurrence does not give a carrier authority to publish local rates or provisions for the carrier issuing the concurrence. If two or more carriers execute powers of attorney to the same agent, it is not necessary for those carriers to exchange concurrences.

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#### § 1312.13 Contents of tariffs.

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(c) **Participating carriers.** (1) (This paragraph does not apply to carriers' local tariffs.) Unless a separate participating carrier's tariff is filed, a list of the participating carriers shall be provided, showing the names of the carriers; the city and state of the principal office of the carrier; and the lead docket number of each carrier's operating authority, if any.

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#### § 1312.17 Amendments.

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(b) **Lists of participating carriers.** (This paragraph does not apply to participating carrier tariffs.)

(1) In bound tariffs, the list shall be amended by—

(i) Publishing a complete new list containing all changes and canceling the prior lists; or

(ii) Publishing a cumulative list of all changes, alphabetically arranged either by code or carrier name, and the statement: "The list of participating carriers is as shown in the tariff except for the following changes." Only one cumulative list may be in effect at one time. A carrier's participation shall be cancelled by showing the carrier's complete name, together with the word "Cancel" or other suitable provision. Changes shall be carried forward in subsequent amendments to the list as reissued matter.

(2) In a looseleaf tariff, the list shall be amended either by (i) republication of the page(s) on which the list appears, indicating the cancellations, additions and changes. The canceled carriers' names shall be republished on a separate page(s) at the end of the list, indicating when the cancellation was first effective, until all provisions in the tariff referring specifically to the carrier(s) have been removed from the effective pages. The pages containing the list shall refer to the page(s) containing the list of canceled carriers; or (ii) reissuing the affected page(s) with an appropriate symbol to show elimination of a carrier.

(3) Concurrent with the cancellation of a carrier from the participating carrier list, all provisions specifically referring to that carrier shall be appropriately amended unless—

(i) the cancellation is in connection with the publication of a complete adoption of the rates of that carrier by another (see § 1312.20); or

(ii) The method permitted in paragraph (b)(4) of this section is used.

(4) A carrier's participation may be canceled by publishing a blanket cancellation notice directly with the list of participating carriers, and referring to the notice when canceling the carrier's name from the list. If this method is used, all provisions specifically referring to that carrier shall be amended as soon as possible. During the interim, an item or provision which specifically refers to that carrier may not be republished unless the reference is concurrently removed.

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#### § 1312.25 Participating carrier tariffs.

(a) **Separate tariffs may be filed by agents.** (1) An alphabetical list of carriers participating in agent's tariffs, along with a description of the underlying tariffs, may be filed in a separate tariff (not a rate tariff). The title page of the participating carrier tariff shall state that it applies only in connection with tariffs referring to it. If the tariff governs tariffs issued jointly by two or more agents, it shall be a joint issue (see § 1312.11).

(2) Except for statements explaining the extent of carriers' participation in governed tariffs (for example, only for local hauls or only for joint hauls) the tariff may not contain provisions governing rate application.

(b) **List of carriers.** (1) The list of participating carriers shall be constructed in the manner required

by this part. Carriers' code designations may be shown directly with the carriers' names.

(2) All governed tariffs in which a carrier participates shall be referred to by ICC designation directly with the carrier's name. The participation of all carrier's in the participating carrier tariff may be provided by a statement, rather than listing the tariff designation directly with the carriers' name.

(c) **List of tariffs.** An agent's participating carrier tariff shall contain a current and correct list of its tariffs, including those which contain their own list of participating carriers or which are issued jointly with another agent(s). If the participating carrier tariff is a joint issue, only the tariffs of the principal agent need be listed. The tariffs shall be listed in numerical order by ICC designation, with a separate section for each agent if joint issues are involved. Each tariff listed shall be described so that its general application may be determined without examining the tariff itself.

(d) **Cancellation of participating carriers.** (1) Except as provided in paragraph (f) of this section, when a carrier's participation in a participating carrier tariff or governed tariff is canceled, all reference to the carrier in the involved tariff(s) shall be canceled.

—(2) The cancellation may be accomplished either by—

(i) Amending all matter to eliminate reference to the carrier; or

(ii) Publishing a blanket cancellation notice.

The blanket cancellation shall be published in the participating carrier tariff and shall be referred to

in the cancellation of the carrier's name. A provision referring to the canceled carrier may not be republished without concurrent cancellation of the reference to that carrier and all matter shall be amended as soon as possible.

(3)(i) In a bound tariff the canceled carrier's name (and reference to the blanket cancellation notice, if used) shall be carried forward as reissued matter in the list of participating carriers.

(ii) In a looseleaf tariff, the carrier's name (and reference to the blanket cancellation notice, if used) and the date the cancellation became effective shall be republished in successive issues of the list of participating carriers until all provisions referring to the carrier are amended.

(e) **Reinstatement of participating carriers.** If a carrier's participation is canceled, and reinstated at a later date, the tariff shall so explain. This explanation shall be referred to directly with the reinstated carrier's name until the participating carrier tariff is reissued.

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#### § 1312.27 Classification, exceptions, rules, dangerous articles and station tariffs.

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(e) **Participation in governing publications.** Carriers participating in tariffs which refer to, and are governed by, separate tariffs (classifications, exceptions, rules etc.), shall also participate in those governing separate tariffs, unless specifically stated in the governed tariffs that provisions in the separate tariffs will not apply for their account. This does

not require participation in local drayage tariffs or in terminal and special services tariffs applicable only for the issuing carrier. Carriers participating in a rate tariff solely to provide substituted service at another carrier's option need not participate in the governing tariffs. See § 1312.38.

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#### § 1312.30 Distance rates.

(a) **Distance rates may be filed.** Distance of mileage (hereafter referred to as distance) class or commodity rates may be filed.

(b) **Method of showing distances.** Distance rates may be published to apply per vehicle per mile, or other unit per mile, or by establishing a rate table or segment showing a scale of distances for which charges will be applied. If the latter method is used, a rate shall be provided for each distance. Each State or area covered by the application of the rates shall be listed. The listing may be brief but informative as to the territorial coverage.

(c) **Determination of Distances.** (1) A tariff containing distances rates shall contain provisions for the determination of distances by—

(i) Publishing the distances between all locations covered by the distance rates in the tariff;

(ii) Referring to a map(s) attached to the tariff;  
or

(iii) Referring to a distance guide(s).

(2) If maps are referred to, the rate tariff shall include a rule specifying the manner in which distances are obtained from maps. The rule shall in-

clude a definite means for determining distances between all locations within the territorial coverage of the rates, regardless of whether or not all the locations are shown on the map and regardless of whether or not actual distances are shown between all locations.

(3) When a map to a tariff is superseded by another, the new map shall be attached to and made a part of a supplement to a bound tariff, or a looseleaf page to a looseleaf tariff, which shall specifically cancel the old map and give effect to the new.

(4) Except as provided in § 1312.13(e)(2), only distance guides officially on file with the Commission may be referred to. More than one may be referred to provided the rate tariff clearly specifies the circumstances under which each guide will apply. An agent's tariff may refer to another agent's distance guide.

(5) Distance guides shall provide distance tables or combinations of tables and maps. Tables shall provide specific distances between a substantial number of the points and be shown as having precedence over the distances determined by the use of maps. Each guide shall provide rules stating its application. The rules shall include a means for determining distances between all locations with the territorial coverage of the guide, regardless of whether all the locations are shown in the guide or whether distances are shown between all locations. If distances between certain points or areas are to be determined only through a certain gateway or interchange point, those points or areas and the gateway or interchange point shall be identified. Distance guides filed in "paper" format may exceed the maximum size limitations imposed by § 1312.3 but may not exceed

14½ by 17½ inches in size. Carriers may file automated distance determination systems which are linked by reference in abbreviated distance guides or rate tariffs to computer stored information provided the following conditions are met:

(i) Carriers or their tariff publishing agents shall make arrangements with the Commission for the receipt, storage and use of the systems through existing Commission technology and facilities.

(ii) In the event that a system is not compatible with Commission technology, the necessary implementing equipment and programs shall be placed on file with the Commission for use by Commission personnel and the public at no cost.

(iii) Proposed changes in the systems shall be given notice and reflect the nature of the change, as required by 49 U.S.C. § 10762(c)(3) and § 1312.4(e) and § 1312.17(f). However, if an electronic distance determination system is not inherently capable of giving notice and symbolization of changes within the program, then printed tariff amendments to the distance guides or rate tariffs will be required. The amendments shall show the currently effective provisions as well as the proposed changes thereto.

(iv) The distance guides or rates tariffs shall provide all the information necessary to access and utilize the systems.

4 Fed. Reg. 4,440 (1939)

# INTERSTATE COMMERCE COMMISSION

## Cancellation of Participation in Agency Tariffs

October 30, 1939

*To All Motor Carriers Subject to Section 217 of the Motor Carrier Act, 1935:*

So many tariff complications and possibly unwitting violations of the law result from the cancelation of the participation of motor carriers in agency tariffs, including classification publications, that it is necessary to call the attention of all interstate common carriers by motor vehicle and their publishing agents to their obligations in this respect.

The law requires that all common carriers shall file with the Commission, and keep open to public inspection tariffs containing all their rates, fares, and charges for transportation and all services in connection therewith. Many carriers have complied with this obligation by participating in agency tariffs filed by agents who act in accordance with the by-laws of bureaus, conferences, or other organizations of motor carriers. Upon failure of a carrier to pay the established dues of such organization, or to comply with the by-laws, in many instances the agent proceeds to cancel the carrier's participation in the agency issues. Such cancelation makes the use of rates in such tariffs by that carrier unlawful. It is likewise unlawful for common carriers to perform in interstate transportation without lawful rates on file covering the services performed. Therefore, the carrier must ar-

range to establish, effective on the same date that its participation in the agency issue is canceled, rates for the transportation services which it may lawfully perform and for which it does not otherwise have rates filed.

An individual carrier may publish its own tariffs to take the place of those formerly published by its agent, or it may arrange to have its rates published by another agent, or republished by the agent who canceled them.

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